

4-1-1996

Surviving Student to Student Sexual Harassment: Legal Remedies and Prevention Programmes

Chantal Richard
Dalhousie University

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Education Law Commons](#)

Recommended Citation

Chantal Richard, "Surviving Student to Student Sexual Harassment: Legal Remedies and Prevention Programmes" (1996) 19:1 Dal LJ 169.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Educators in Canada have recently identified that incidents of sexual harassment between students occur daily in our junior high and high schools. Sexual harassment seriously affects a student's emotional and physical well-being and negatively affects her opportunity to receive an equal education. In this article, the author examines the existing legal remedies available to a student victim of sexual harassment and concludes that student sexual harassment is best dealt with through education and preventative measures taken by school boards.

Les intervenants du milieu de l'éducation au Canada ont récemment révélé que les cas de harcèlement sexuel entre étudiants sont chose courante, voire même quotidienne, dans nos écoles secondaires. Le harcèlement sexuel a de sérieuses conséquences sur le bien-être émotif et physique de l'étudiante et il diminue considérablement ses chances de profiter de l'égalité en matière d'éducation. Dans cet article, l'auteure examine les recours judiciaires à la disposition des victimes de harcèlement sexuel en milieu scolaire. Elle conclut que les conseils scolaires sont les mieux placés pour traiter de cette forme de harcèlement sexuel par le biais de programmes éducatifs et de mesures préventives.

Introduction

I was standing to answer a question when the guy behind me put his hand on my leg and started to move it up under my skirt. I turned and swore at him. I got suspended and he got a talking to.¹

They [male students] basically concentrated on making fun of my weight. Like they would call me "fat ass bitch," down the hallway. They left notes in my mail box. They left notes in my locker, they egged my house. . . . And phone calls, like pranks and stuff. I lost a lot of weight 'cause it really bothered me.²

A lot of girls won't walk down school hallways 'cause they know guys will be there grabbing their arms or saying, "Oh, come here baby." Most girls won't walk through a particular hallway because of the gestures.³

* LL.B. Candidate, Dalhousie Law School, 1997.

1. *The Joke's Over—Student to Student Sexual Harassment in Secondary Schools* (Toronto: Ontario Secondary School Teacher's Federation, 1995) at 3 [hereinafter *The Joke's Over*].

2. Canadian Broadcasting Corporation, "Boys Will Be Boys" (November 14, 1995), Transcript of CBC's National Magazine at 10.

3. J. Larkin, *Sexual Harassment: High School Girls Speak Out* (Toronto: Second Story Press, 1994) at 13.

In some of my classes the guys embarrass you and mostly in front of everybody. So in class the first month or so, I'd be quiet, really quiet. If they're quiet and they don't do anything, then later I can talk.⁴

[T]hey [male students] call it a 'bitch slap', across the face. I was in school one day and we were fighting and he just picked me up and he was just like, "Shut up, shut up! I'm the man, I'm the man!" And then like he hit me.⁵

The preceding testimony is from just five of thousands of girls who endure sexual harassment on a regular basis at school. The harassers are most often their male classmates.⁶ The problem of sexual harassment in schools has long been ignored or dismissed. Educators have only recently begun to recognize the pervasiveness of sexual harassment in the schools and the devastating impact it can have on female students in particular. Over the last few years many school boards across Canada have been developing and implementing sexual harassment policies in an attempt to address the problem. Whether these policies are an effective means of dealing with sexual harassment in the schools remains uncertain.

While the identification of sexual harassment and the realisation that it creates and maintains gender inequality in the workplace has been part of the public consciousness for the past two decades, these ideas have been slower to filter down into our schools. Although most Canadian universities have had a sexual harassment policy in place for the past several years, there has been no parallel process at the elementary and secondary school levels. Within the elementary and secondary school systems, sexual harassment in the form of sexually demeaning insults, lewd gestures and grabbing has been tolerated to a large extent because of the prevailing attitude that "boys will be boys." It is ironic that as a society we expect young girls to cope with harassment on a daily basis because growing boys cannot help themselves, when exactly the same behaviour is no longer considered acceptable in the workplace.

Sexual harassment in school impacts on a girl's emotional and physical well-being, as well as affecting her opportunity to an equal education. Victims of sexual harassment are typically burdened with feelings of humiliation, guilt and frustration.⁷ In addition, girls who are preoccupied with sexual harassment avoidance strategies both in and out of the classroom cannot give proper attention to their academic pursuits. Sexual

4. *Ibid.*

5. *Supra* note 2 at 13.

6. American Association of University Women, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* (Louis Harris and Associates Inc., 1993) at 19 [hereinafter *Hostile Hallways*]. Although a majority of the harassed are girls, boys may also be victims of sexual harassment. However, boys are often the harassers of other boys as well.

7. For a discussion of the impact of sexual harassment, see *infra* text accompanying notes 31 to 35.

harassment is not only threatening to individual victims but is linked to more general problems of gender bias and inequity in the educational context. Although many schools are trying to remedy the current state of affairs through changes to the curriculum or through equal opportunity initiatives to encourage girls to enter math or science streams, these efforts do not go far enough. As long as sexual harassment in schools is tolerated or ignored, girls are not able to participate as true equals in the educational process. It is essential that all students be able to pursue their academic interests in a harassment-free environment. This paper explores some of the options which may allow them to do so.

Part I of this article provides a definition of sexual harassment and describes the scope of the problem. Part II surveys the current law relating to sexual harassment in Canada and considers the legal remedies available to student victims. Finally, Part III recommends the development and implementation of sexual harassment policies in schools as well as the adoption of educational strategies to tackle sexual harassment at a grassroots level. Although it is possible that a victim of peer sexual harassment at school could remedy the situation through legal avenues, the problem is best dealt with through education and prevention strategies at a local school level. Education strategies which address the issue of sexual harassment should be part of a broader goal to achieve gender equality in the schools.

I. *The Scope of the Problem*

1. *In the Workplace*

Much of the dialogue on sexual harassment has centred around the workplace. Three-quarters of those surveyed by the Canadian Human Rights Commission in 1983 believed that sexual harassment is a serious problem for working women.⁸ In recent years, perhaps nothing has highlighted the issue more than the 1991 American senate hearings which considered allegations by Anita Hill that Supreme Court nominee, Clarence Thomas, had sexually harassed her. During the hearing and in its aftermath, public debate on the issue of sexual harassment intensified on both sides of the border.

8. *Unwanted Sexual Attention and Sexual Harassment: Results of a Survey of Canadians* (Ottawa: Canadian Human Rights Commission, 1983) at 5 [hereinafter *Unwanted Sexual Attention and Sexual Harassment*]. The survey found that forty-nine percent of women and thirty-three percent of men had experienced unwanted sexual attention. Supervisors and co-workers were most commonly identified as those who had initiated the unwanted sexual attention.

While there are many parallels between sexual harassment in the workplace and sexual harassment in the schools, working women are arguably in a better position to deal with the problem. There may still be considerable reluctance among women to directly confront harassing behaviour, but in the workplace there has increasingly been a shift away from considering certain types of behaviour as "normal" to viewing it as deserving of legal sanction.⁹ In-house sexual harassment policies are common to many corporations and government agencies. Some unions have taken an active role in addressing the problem.¹⁰ Besides the provisions against sexual harassment in much of the human rights legislation across the country, there is also a statutory provision against sexual harassment in the *Canada Labour Code*.¹¹ If available measures fail, working women have a limited option of seeking other employment. It is not entirely clear that female students have the same right to legal protection in the school environment as do women in the workforce. The fact that school attendance is mandatory may also place girls in a position of greater vulnerability to the damaging effects of sexual harassment.

2. *In the Schools*

Sexual harassment seems endemic in high schools. In a recent study of representative Ontario high schools, eighty percent of female students had been sexually harassed.¹² While the problem appears to be widespread at the high school level, most students begin to experience sexually harassing behaviour in elementary and junior high schools.¹³ Ninety percent of the incidents of sexual harassment occur in school hallways, but classrooms, cafeterias, school grounds and school transportation are also common places for harassment to take place.¹⁴

The stereotypical example of sexual harassment in the educational context is one in which a male professor or teacher harasses one of his female students by demanding sexual favours in return for a passing or

9. P. Hughes, "The Evolving Conceptual Framework of Sexual Harassment" (1994) 3 C.L.E.L.J. 1.

10. M. Cornish & S. Lopez, "Changing the Workplace Culture Through Effective Harassment Remedies" (1994) 3 C.L.E.L.J. 95.

11. R.S.C. 1985 (1st Supp.), c. 9, s. 17.

12. *Supra* note 1 at 1.

13. *Supra* note 6 at 7-8. Fifty-four percent of girls and forty percent of boys are likely to first experience sexual harassment between the sixth and ninth grade.

14. *Supra* note 1. Statistics from the survey are percentage estimates from bar graphs because the actual percentage figures were not republished in the report and were unavailable from the Ontario Secondary Schools Teachers' Federation.

improved grade.¹⁵ In fact, student to student sexual harassment is far more common. A recent American study suggests that students are four times more likely to be harassed by another student than by a school employee.¹⁶ The dynamic of student to student sexual harassment is consistent with statistics on co-worker harassment.¹⁷ While teacher to student harassment is certainly serious and can be more damaging because of the power differential between the parties, this article focuses on student to student sexual harassment.¹⁸ It is important to note however, that sexual harassment involving teachers can still be significant to an analysis of peer sexual harassment. Teachers who sexually harass may increase a student's sense of intimidation at school; when female students witness their female teachers being sexually harassed by students or other teachers, their sense of powerlessness can be reinforced.¹⁹

3. *Definition and Description*

Before examining the problem of sexual harassment in greater detail, it is necessary to provide scope to what is meant by the term. Sexual harassment is unwanted and uninvited behaviour of a sexual nature which makes someone feel unsafe or uncomfortable.²⁰ Sexual harassment forms part of the continuum of violence against women in our society. Although a single sexual insult is not as serious as a sexual assault, the cumulative effects of sexual harassment can be just as devastating and harmful as behaviour which lies further along the continuum. As with most acts of violence against women, sexual harassment serves to maintain the power imbalance in a male-dominated society by devaluing and mistreating females.²¹

15. Popular culture continues to reinforce this image of teacher/student sexual harassment. For example, American playwright, David Mamet's, most recent work, *Oleanna*, and a recent *Beverly Hills 90210* episode both locate the contentious behaviour as occurring between teacher and student.

16. *Supra* note 6 at 10–11. Eighty-six percent of girls and seventy-one percent of boys are targeted by their peers. Of the eighty-one percent total who are harassed, only eighteen percent are harassed by school employees.

17. *Supra* note 8.

18. There are many permutations of sexual harassment which can occur within the school context. These include teacher to teacher or support staff, administration to teacher or support staff and student to teacher.

19. J. Larkin, Presentation to sexual harassment policy advisors of Halifax County-Bedford District School Board (4 November 1995).

20. See *supra* note 3 at 21; *supra* note 1 at 6; A.P. Aggarwal, *Sexual Harassment in the Workplace*, 2d ed. (Toronto: Butterworths, 1992).

21. *Supra* note 3 at 22.

4. *Forms*

Forms of sexual harassment can be divided into three main categories. Verbal harassment is the most common type and includes sexual taunts, innuendoes, propositions or invitations for sexual activity, comments which objectify a woman's body, crude or demeaning jokes, whistling, catcalls, invasive questions or remarks about one's sex life, and obscene or threatening phone calls.²² Physical forms of harassment are included in the second category. Of these, touching or grabbing a woman's buttocks or breasts is the most common form.²³ Physical harassment can escalate into kicking, or even stalking a victim. For a number of young women, "date rape" could be considered the ultimate form of sexual harassment.²⁴ The final category, visual harassment, includes leering or staring, sexual gesturing, demeaning graffiti and the display of pornographic materials.²⁵

The way in which minority women experience sexual harassment is particularly troubling. Sexual taunts or propositions targeting Aboriginal, Black, or Asian women are often laced with racial slurs or based on racial stereotypes.²⁶ A woman who is blind or in a wheelchair can be subject to seemingly well-meaning offers to help, which turn out to take sexual advantage of her disability.²⁷ Harassment based on sexual orientation is unique because lesbian and gay students can be hurt by the behaviour even when they are not singled out as the object of homophobic harassment. It is a common practise in schools to use homophobic slurs against any student who veers from gender-based stereotypes; yet homosexual students who witness the behaviour become indirect targets of the harassment.

22. Sexual comments, jokes, gestures and looks represent eighty percent of offensive behaviour: *supra* note 1.

23. *Supra* note 1. Sixty to sixty-five percent of victims have been "touched, grabbed or pinched in a sexual way." See also *supra* note 6 at 19.

24. *Supra* note 3 at 87. One study revealed that thirty-eight percent of women who have experienced date rape are between the ages of 14 to 17 years old. B. Levy, ed., *Dating Violence: Young Women in Danger* (Seattle, WA: Seal Press, 1991).

25. *Supra* note 3 at 88-92.

26. *Ibid.* at 92-93. Testimony from students interviewed by June Larkin provides examples. Black girls typically receive lower scores in the humiliating but common practice of boys rating girls in school hallways. Minority women also hear comments such as: "I hear Black girls are good in bed," or "When are we going to get together because I've never made love to a Chinese woman before? I wonder how it feels."

27. *Supra* note 19. June Larkin provides the example of a boy helping a blind girl find her seat in the classroom and then patting her on the bum as she sits down.

5. *Impact*

While a significant number of boys identify themselves as victims of sexual harassment,²⁸ the gender gap widens when one considers the rate at which boys and girls experience sexual harassment.²⁹ One American magazine reported that forty percent of girls experience sexual harassment on a daily basis.³⁰ Sexual harassment can be damaging to girls in a variety of ways. In a recent Ontario study, *The Joke's Over*, seventy-eight percent of high school girls claim that they are afraid of being sexually harassed, while only thirty percent of boys report a similar fear.³¹ Female victims are also far more embarrassed and self-conscious about incidents of sexual harassment than their male classmates.³² The frustration and tension around experiencing sexual harassment or having constantly to fend it off can result in physical symptoms such as crying, nausea, headaches and insomnia.³³ Sadly, many young women who already have an unhealthy preoccupation with their weight tend to monitor eating patterns even more if they are routinely referred to as a "cow" or "pig".³⁴ Female students may also alter their daily routine to avoid certain areas of the school where sexual harassment prevails or at least ensure that they are not alone in these areas.³⁵ Sexual harassment also affects academic performance since girls may skip classes or limit their participation in class discussion in an attempt to avoid sexually harassing behaviour.³⁶ As well they may be distracted in class by incidents which target classmates

28. *Supra* note 6 at 7. In the most extensive study done on sexual harassment in the schools, the American Association of University Women found that seventy-six percent of boys reported being targets of sexually harassing behaviour. In the same study eighty-five percent of girls were sexually harassed.

29. *Supra* note 6 at 7. Of the fifty-eight percent of students who reported being sexually harassed often or occasionally, sixty-six percent were females while forty-nine percent were males.

30. A.N. Leblanc, "Harassment at School: The Truth is Out" (May 1993) *Seventeen* 134.

31. *Supra* note 1.

32. *Supra* note 6 at 16–17. Sixty-four percent of girls and thirty-six percent of boys felt embarrassed after being sexually harassed. Fifty-two percent of girls and only twenty-one percent of boys said it made them feel self-conscious.

33. *Ibid.* at 15. See also *supra* note 3 at 102.

34. *Supra* note 3 at 109. One girl in Larkin's study said she stopped eating for days whenever boys called her a "pig" or "cow".

35. *Ibid.* at 109–10. See also *supra* note 6 at 18, where sixty-nine percent of girls who have been harassed said they alter their routine at school to avoid a harasser. Only twenty-seven percent of harassed boys alter their routine.

36. *Supra* note 3 at 110–11. See also *supra* note 6 at 18: One-third of female students who had been victims of sexual harassment reported not wanting to go to class or talk in class. Only twelve to thirteen percent of males who had been targets of sexual harassment said the same thing.

or by an earlier incident directed at them.³⁷ The growing concern among educators regarding girls harassing other girls can also be explained as a factor of the internalised process of devaluing the feminine.³⁸

Boys do not generally appear to be as threatened or as humiliated as their female classmates when they are the targets of sexual harassment. Some boys report that they are flattered by the sexual attention of a girl even in cases where the behaviour is not particularly welcome.³⁹ Homophobic comments or homosexual advances are the only types of sexual harassment which appear to bother boys as much as they bother girls.⁴⁰ It is telling that boys who exhibit "feminine" characteristics are most likely to be the ones who are subject to homophobic harassment.⁴¹ One reason why sexual harassment may not have as negative an impact on boys, has to do with the fact that boys know intuitively that girls cannot abuse the power differential between the sexes. One boy indicated that experiencing sexual harassment by a girl is not the same because "[t]hey're not as high up as we are."⁴²

6. *"Boys will be boys"*

One of the biggest challenges to eliminating sexual harassment in the schools is to get educators, parents, and students to recognise the behaviour as sexist and indefensible. Boys do not always realise that sexually harassing behaviour is actually offensive and hurtful to their female classmates. Sometimes boys will claim that the behaviour in question was only meant as a joke or flirtation. Girls, in turn, do not always make the link between sexual harassment and the degrading behaviour they may regularly experience. This should not be surprising

37. When first presented with the overwhelming evidence of widespread sexual harassment in today's schools, I was surprised at how much the state of affairs had changed since I had graduated from the system about eight years ago. It was only after beginning to research this paper that I was able to recall incidents dating back to grade two which would clearly constitute sexual harassment. It is astonishing to realize that at the time I barely questioned the appropriateness of activities which included at an extreme a male grade 7 teacher who fondled male classmates, and a high school teacher who told sexually graphic jokes and displayed pornographic material in his classroom. It certainly would not have occurred to me to challenge the behaviour of teenage boys. The extent to which much of what is sexually harassing behaviour is normalized, or at least tolerated, cannot be underestimated.

38. *Supra* note 3 at 69–71. It is common, for example, for girls' washrooms to be covered in graffiti which refers to individual girls as "bitch", "slut" and "whore".

39. *Ibid.* at 35.

40. *Supra* note 6 at 20. Eighty-six percent of boys and girls report that they would be "very upset" if called gay or lesbian. Boys are more than twice as likely to be targeted by harassment which relates to sexual orientation.

41. *Supra* note 3 at 35.

42. *Ibid.*

in a culture that consistently sanctions the treatment of women as sexual objects. When women are presented in advertising, films, television programmes, and popular songs as objects to be ogled, fondled, and propositioned, both males and females implicitly learn that this is “normal” gender interaction. Furthermore, women are taught to look to men for approval of their appearance. This confuses the issue of where to draw the line between sexual harassment and sexual flirtation. While on the one hand, a girl is left feeling uncomfortable because a boy is leering or commenting on parts of her body, on the other hand, she may struggle with a desire to be noticed.⁴³ The result is that many forms of sexually harassing behaviour are normalized and girls unconsciously accept that a certain amount of sexual harassment is part of the reality of being female.

The essentialist notion that sexual harassment occurs because “boys will be boys” is inappropriately dismissive. Moreover, it is a suggestion which is insulting to the many men who do not sexually harass. Sexual harassment is not an inevitable part of teenage maturation nor is it a normal expression of masculinity. It is helpful to consider some of the reasons why high school boys say they sexually harass. Some explanations are overtly sexist: “To be masculine and let them know we’re boss,” or “They deserve it. Guys are better than women I say.”⁴⁴ Many students who have admitted to sexually harassing someone, responded that they do it because “it is just part of school life—no big deal—lots do it,”⁴⁵ or because they wish to annoy the target of their harassment.⁴⁶ A number of high school girls believe that boys harass to show off in front of their friends and to protect themselves from harassment.⁴⁷ It appears that boys do not harass because of their sex but because of the power their gender affords them. As one young woman commented, “Guys sexually harass females because they can.”⁴⁸

43. P. Orenstein, *SchoolGirls: Young Women, Self-Esteem and the Confidence Gap* (New York: Doubleday, 1994).

44. *Supra* note 2 at 12.

45. *Supra* note 1. Forty-two percent of student harassers chose this response. See also *supra* note 6 at 12 where thirty-seven percent of student perpetrators who were asked why they believe someone sexually harasses chose the same response.

46. *Ibid.* Thirty-seven percent selected this reason.

47. *Supra* note 3 at 96.

48. *Ibid.* at 99.

II. *Legal Recourse*

A student who has been sexually harassed by another student may wish to seek legal redress. Most sexual harassment cases are dealt with under human rights legislation but there appear to be no reported tribunal decisions on cases involving a student harassing another student within the primary or secondary school systems. As most tribunal decisions involving sexual harassment have arisen in the employment context, it is instructive then, to examine this jurisprudence. A brief glimpse at other legal proceedings available to a victim of sexual harassment may also prove useful.

1. *Human Rights Legislation*

There are several points of consideration for a student who is thinking of lodging a complaint with a human rights commission. As a preliminary matter, a human rights commission may not consider investigating a student's complaint until she has exhausted internal procedures such as might be provided under an in-school sexual harassment policy. Further, even where a student is successful in bringing her complaint before a human rights tribunal, she will have to be concerned with at least some of the following interrelated issues: (1) the application of human rights legislation to a cause of action between two students; (2) the liability of the school board for the actions of the harassing student; (3) the burden of proof which must be met by the complainant; (4) the application of the "reasonable person" standard; (5) the extent to which the complainant's past conduct is taken into account; and (6) the power of the tribunal to order that the school board take proactive measures to address the problem of sexual harassment within the school.

a. *Definition of Sexual Harassment*

Many of the provincial human rights codes contain a specific definition of sexual harassment or a more general definition of discriminatory harassment.⁴⁹ Under the Nova Scotia *Human Rights Act*,⁵⁰ for example, sexual harassment is defined as follows:

49. See *Human Rights Code*, S.M. 1987-88, c. 45, s. 19(2); *Human Rights Act*, R.S.N.B. 1973 c. H-11, s. 7.1; *Human Rights Code*, R.S.N. 1990, c. H-14, ss. 2(g), 13; *Human Rights Code*, R.S.O. 1990, c. H.19, ss. 7(2), 10; *Human Rights Act*, R.S.Y. 1986, Supp., c. 11, s. 13. 50. R.S.N.S. 1989, c. 214, s. 3(o), as am. by S.N.S. 1991, c. 12.

3(o) "sexual harassment" means

- (i) vexatious sexual conduct or a course of comment that is known or ought reasonably to be known as unwelcome,
- (ii) a sexual solicitation or advance made to an individual by another individual where the other individual is in a position to confer a benefit on, or deny a benefit to, the individual to whom the solicitation or advance is made, where the individual who makes the solicitation or advance knows or ought reasonably to know that it is unwelcome, or
- (iii) a reprisal or threat of reprisal against an individual for rejecting a sexual solicitation or advance.

For the purposes of student to student sexual harassment, s. 3(o)(i) is most important. Behaviour referred to in s. 3(o)(ii) is characterized as quid pro quo harassment. In order to be found responsible for harassment of this kind, an individual needs to have some form of supervisory authority or control over the target of his advances. Much of what constitutes sexual harassment between students can be characterized as hostile or poisoned environment harassment. Victims of hostile environment harassment suffer no direct financial injury, but they are asked to endure a climate which may cause psychological or emotional harm and which may affect their ability to perform their responsibilities at work or school.⁵¹

Until quite recently, a victim of sexual harassment had to establish that sexually harassing behaviour amounted to sex discrimination because there was no direct prohibition against sexual harassment in human rights legislation. Prior to the authoritative decision by the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd.*,⁵² there was considerable resistance in some lower courts to the characterization of sexual harassment as sex discrimination. Some provincial human rights codes now declare that sexual harassment is *prima facie* discriminatory. For example, the Nova Scotia *Human Rights Act* states:

5(1) No person shall in respect of

- (a) the provision of or access to services or facilities; . . . discriminate against an individual or class of individuals on account of . . .
- (m) sex; . . .

(2) No person shall sexually harass an individual.⁵³

51. B. Lindemann & D.D. Kadue, eds., *Sexual Harassment in Employment Law* (Washington: BNA Books, 1992).

52. [1989] 1 S.C.R. 1252.

53. *Supra* note 50.

Human rights legislation in some provinces such as British Columbia⁵⁴ and Prince Edward Island⁵⁵ does not specifically prohibit harassment as a form of discrimination based on sex or other prohibited grounds. As such, students residing in one of these provinces who wish to make a complaint of sexual harassment would have to rely on the decision in *Janzen v. Platy Enterprises Ltd.*⁵⁶ in order to show that they have been victims of sex discrimination.

b. *Application of Human Rights Legislation to Students*

Sexual harassment victims must pass a threshold test to make a complaint under Nova Scotia's *Human Rights Act*.⁵⁷ Section 5 requires that one show discrimination in the provision of or access to services or facilities. Although s. 5(2) appears to stand on its own so that any individual can be held liable for sexual harassment, the definition of "person" in that statute suggests that the individual must be someone who is or represents an organization involved in the provision of employment or services. Section 3(k) defines "person" as an "employer, employers' organization, employees' organization, professional association, business or trade association, whether acting directly or indirectly, alone or with another, or by the interposition of another."⁵⁸ Since public education is a service provided by the school board, a complainant who has been harassed by another student will want to make the necessary connection between the student and the provider of services. In an action brought for sexual harassment of one student by another, the school board can also be named. Section 40 of the *Human Rights Act* helps to establish that an action may be brought against a body such as the school board for acts committed by individuals who are within their control:

A prosecution for an offence under this Act may be brought against an employers' organization, employees' organization, professional association or business or trade association in the name of the organization or association, and for the purpose of any prosecution, these are deemed to be corporations and any act or thing done or omitted by an officer or agent within the scope of the officer or agent's authority to act on behalf of the organization or association is deemed to be an act or thing done or omitted by the organization or association.⁵⁹

54. *Human Rights Act*, S.B.C. 1984, c. 22.

55. *Human Rights Act*, R.S.P.E.I. 1988, c. H-12.

56. *Supra* note 52.

57. *Supra* note 50.

58. *Ibid.*

59. *Ibid.* [emphasis added].

Section 40 anticipates that based on the principles of agency law, employers will be held responsible for actions of those individuals who act on behalf of the organization. It is clearly more problematic to suggest that an organization is responsible for individuals who are not acting on behalf of the organization such as lower level employees or, in the case of a school board, its students.

c. *School Board Liability*

The leading Canadian case on employer liability for sexual harassment in the workplace is *Robichaud v. Canada (Treasury Board)*.⁶⁰ In this case, the Supreme Court of Canada accepted the lower court finding that Bonnie Robichaud's supervisor had sexually harassed her. The issue on appeal was whether an employer could be liable for the unauthorized acts of its employees. Emphasizing the remedial nature of human rights legislation, La Forest J. stated:

[I]f the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can provide the most important remedy—a healthy working environment.⁶¹

It is equally true that school boards are in the best position to provide students with a healthy learning environment. In the case of *Ross v. New Brunswick School District No. 15 and Attis*,⁶² it was alleged that the off-duty conduct of a teacher contributed to a poisoned environment in the classroom. At the tribunal level, Professor Bruce found that the School Board endorsed the activities of Malcolm Ross because of its failure to discipline him meaningfully.⁶³ The tribunal decision was overturned by the New Brunswick Court of Appeal but the Supreme Court of Canada upheld the decision of the Board of Inquiry. Writing for a unanimous court, La Forest J. concluded that although there was no direct evidence that Ross's off-duty conduct impacted upon the school district, a reasonable inference was sufficient to support a finding that his continued employment impaired the educational environment by creating a "poisoned" atmosphere characterized by a lack of equality and tolerance. Further, La Forest J. stated that he was in complete agreement with the Board's statement that "[a] school board has a duty to maintain a positive school environment for all persons served by it and it must be ever vigilant

60. [1987] 2 S.C.R. 84 [hereinafter *Robichaud*].

61. *Ibid.* at 94.

62. [1996] S.C.J. No. 40 (Q.L.), rev'g (1993), 142 N.B.R. (2d) 1 (C.A.), rev'g in part *Attis v. New Brunswick School District No. 15* (1991), 121 N.B.R. (2d) 1 (Board of Inquiry).

63. Board of Inquiry, *ibid.* at 79.

of anything that might interfere with this duty.”⁶⁴ In a similar vein, universities have been held liable for sexual harassment by professors. In *Memorial University v. Rose*⁶⁵ the student complainant charged a professor with sexual harassment. The Court agreed that for the purposes of sexual harassment discrimination, a university student was the equivalent of an employee according to the provincial human rights legislation, and had the right to expect protection from her “employer”, Memorial University.

Case law outside of the Canadian human rights context reveals that school boards have been held liable for conduct between students. For example, school boards have been held liable in tort for student injuries caused by the actions of other students.⁶⁶ In tort cases, school boards are held to the standard of care that would be exercised by a “careful and prudent parent”.⁶⁷

Complainants can also point to recent American decisions as persuasive argument for holding school boards liable for sexual harassment by other students. In *Doe v. Petaluma City School District*,⁶⁸ the complainant was awarded \$15,000 because the school failed to remove explicit graffiti about her from the boys’ washroom. Tawnya Brawdy of California received \$20,000 because the school refused to take action against the boys who continuously mooed at her and jeered at the size of her breasts.⁶⁹ Most sexual harassment cases in the United States are based on Title VII of the *Civil Rights Act*,⁷⁰ which prohibits discrimination in employment on the basis of sex. The *Civil Rights Act* is roughly similar to the *Canadian Human Rights Act*⁷¹ in that it is a federal statute, but the American act has wider application. Sexual harassment cases in schools and universities are based on Title IX of the Education Amendments of 1972,⁷² which prohibits discrimination on the basis of sex in any federally funded

64. *Supra* note 62 at para. 50 quoting the decision of the Board of Inquiry, *ibid.* at 80.

65. (1990), 80 Nfld & P.E.I.R. 97 (Nfld S.C.T.D.).

66. See for example *Petersen v. Surrey School District No. 36* (1994), 84 B.C.L.R. (2d) 109 (C.A.) [student hit in face by flying bat]; *Henze v. Board of School Trustees of School District No. 72* (unreported, 29 April 1994) [7 year old injured on playground while roughhousing with older boys]; but see *Lyth v. Dapp and Board of School Trustees School District No. 44* (unreported, May 2, 1988) [male student sexually abused by teacher; two other students had made vague complaints about the teacher three years previously]; *Mainville v. Ottawa Board of Education* (1991), 75 O.R. (2d) 315 (Ottawa Sm. Claims) [student hit by snowball thrown by another student].

67. The test is set out in *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21.

68. 830 F.Supp. 1560 (N.D. Cal. 1993).

69. *Supra* note 43 at 115.

70. 42 U.S.C. § 1983.

71. R.S.C. 1985, c. H-6.

72. 20 U.S.C. § 1681(a).

education programme. Title IX school cases still use a Title VII analysis and case law to discern the existence of sexual harassment and the appropriate extension of liability. The only United States Supreme Court decision regarding sexual harassment in schools is one involving harassment of a student by a teacher. Despite the decision in *Doe v. Petaluma City School District*,⁷³ the more authoritative Supreme Court decision in *Franklin v. Gwinnett County Public Schools*⁷⁴ makes it unclear whether American courts will generally be prepared to apply the reasoning to cases of student to student sexual harassment. In some respects then, American case law regarding sexual harassment between students is in the same state of uncertainty as in the Canadian context.

In Canada, human rights cases addressing employer liability for co-worker sexual harassment can provide strong arguments in favour of school liability for student to student sexual harassment. The analogy between student to student sexual harassment and co-worker sexual harassment is appropriate because school administrators exert at least as much control over students as employers do over all of their employees. Arguably, schools have more influence over their students because they have the statutory authority to discipline them⁷⁵ and monitor their mandatory attendance until they reach the age of sixteen years.⁷⁶

A student complainant may also want to rely on cases where an employer has even been held liable for conduct of non-employees. There are American and Canadian cases involving employer liability for customers. In *Mohammad v. Mariposa Stores Ltd.*⁷⁷ a customer made a racist comment to the complainant store clerk. After being subject to a similarly offensive insult in a second incident with the same customer, the clerk finally swore back at him and was subsequently fired. The British Columbia Board of Inquiry held that the act of dismissing the sales clerk made the employer liable for discrimination based on race. In the American case *Llewellyn v. Celanese Corp.*⁷⁸ the employer was held liable for sexual harassment because he failed to act on a waitress's complaint that a customer had just touched her breast.

73. *Supra* note 68.

74. 911 F.2d 617 (11th Cir 1990). But see also *Davis v. Monroe County Board of Education*, (U.S.C.A., 11th Circuit) (14 February 1996) [unreported] where the majority of the court held that Title IX does encompass a claim for damages due to sexual harassment by fellow students when supervising authorities knowingly fail to act. In this case, the school board was held liable because one of its principals and at least three teachers were aware that a grade five student had been severely sexually harassed by a classmate over a period of six months and did not react in a sufficient manner to the complaints of the student or her mother.

75. *Education Act*, S.N.S. 1995-96, c. 1, ss. 121-24.

76. *Ibid.* at s. 111.

77. (1990), 14 C.H.R.R. D/215 (B.C. Council of Human Rights).

78. 693 F. Supp. 369 (W.D.N.C. 1988).

In cases of co-worker sexual harassment, the test for employer liability depends on whether the employer knew or reasonably ought to have known that sexual harassment had occurred and failed to act on that knowledge. The test was adopted by La Forest J. in the *Robichaud*⁷⁹ decision. It arises out of guidelines produced by the American Equal Employment Opportunity Commission (EEOC):

[W]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can be shown that it took immediate and appropriate corrective action.⁸⁰

In order to meet the first part of the test regarding knowledge by the employer, it will usually be necessary for the complainant to show that she reported the sexually harassing incident to someone in a position of authority.⁸¹ However the existing case law does not make it clear what will be required of a complainant to meet this burden. In *Bauer v. Crossroads Family Restaurant Ltd.*,⁸² despite the fact that three waitresses laid complaints against two cooks for sexual harassment and one of the women stated that she complained twice to her supervisor about the behaviour, the Saskatchewan Board of Inquiry found that there was still not enough evidence that the employer knew of the incidents. In some cases though, courts may be prepared to find that authorities had constructive knowledge of sexual harassment. Although there are no Canadian cases finding constructive notice to employers or school boards, the American cases, *Doe v. Petaluma City School District*⁸³ and *Lipsett v. University of Puerto Rico*,⁸⁴ provide possible scenarios where school authorities are deemed to have knowledge of sexual harassment. In *Lipsett v. University of Puerto Rico*,⁸⁵ a medical student made a complaint against the university because other students displayed pornographic materials in the main lounge. The programme director was deemed to have knowledge of the offensive materials because he frequented the area. The doctrine of constructive knowledge is significant to school harassment cases because offensive graffiti in washrooms is a common form of sexual harassment by students. Another potential situation for

79. *Supra* note 60.

80. *EEOC Guidelines* 29 C.F.R. § 1604, 11(d).

81. See *Bonthoux v. L.S.Y. Holdings Ltd.* (1992), 16 C.H.R.R. D/327 (B.C. Council of Human Rights) and *Broadfield v. De Havilland/Boeing of Canada Ltd.* (1993), 19 C.H.R.R. D/347 (Ont. Board of Inquiry).

82. (1988), 9 C.H.R.R. D/4951 (Sask. Board of Inquiry).

83. *Supra* note 68. See accompanying text for the facts of the case.

84. 864 F.2d 881 (1st Cir. 1988).

85. *Ibid.*

liability would be where the school may have had no knowledge of offensive incidents involving the particular complainant, but where it could be shown that they knew of prior complaints by other victims of the alleged harasser.

The second part of the employer liability test requires the complainant to show that the employer failed to act on the knowledge of sexual harassment. Additionally, employers may be held liable for sexual harassment where they acted on a complaint but did not inform the complainant that anything had been done about the incident.⁸⁶ In *Robichaud*, La Forest J. speculates on how employer conduct will affect liability:

[A]n employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability.⁸⁷

Some courts have followed *Robichaud* unequivocally, holding the employer responsible for providing a non-discriminatory atmosphere even where the harassing employee was not a supervisor and the employer had no notice of the behaviour.⁸⁸ Although an employer's defence was not available at the time *Robichaud* was decided, the *Canadian Human Rights Act* now incorporates a defence of due diligence into the legislation:

An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.⁸⁹

The Nova Scotia *Human Rights Act*⁹⁰ does not include the defence of due diligence, but a board of inquiry may be persuaded that proactive measures taken by an employer or school board to prevent sexual harassment should negate their liability in certain circumstances.

86. See *Wilgan v. Wendy's Restaurants of Canada Inc.* (1990), 11 C.H.R.R. D/119 (B.C. Council of Human Rights). An employee who had complained to management of sexual harassment by a co-worker quit her job because she was not aware that the situation had been handled.

87. *Supra* note 60.

88. *Lynch v. Theodorakakos* (1992), 16 C.H.R.R. D/319 (B.C. Council of Human Rights).

89. *Supra* note 71 at s. 65(2).

90. *Supra* note 50.

d. *Complainant's Burden of Proof*

Employer liability for sexual harassment is of course contingent on the fact that the complainant is able to show sexual harassment by another student. The test to determine the existence of sexual harassment is outlined in *Zarankin v. Johnstone*.⁹¹ The complainant must show on a balance of probabilities that the alleged conduct occurred and that it constituted sexual harassment in the circumstances. The fact that the alleged harasser did not intend the consequences of his actions is generally irrelevant in human rights cases. In *Ontario Human Rights Commission v. Simpson-Sears Ltd.*⁹² the Supreme Court of Canada held that because the purpose of human rights legislation is to alleviate the effects of discrimination, it is not necessary for complainants to establish an intent to discriminate. Given the highly ambiguous and contextualized nature of sexual harassment, it would be extremely onerous for a complainant to prove that each sexual taunt or comment was meant as an insult and not as a joke. The issue of intent is also relevant in "hostile environment" sexual harassment cases where the conduct may not be directed at the complainant herself, yet she still suffers the impact of the offensive behaviour.

The definition of sexual harassment in the Nova Scotia *Human Rights Act* invokes the standard of the reasonable person to determine whether conduct constitutes sexual harassment: "vexatious sexual conduct . . . that is known or *ought reasonably to be known* as unwelcome".⁹³ Criticism of the reasonable person standard has been made in the criminal and the tort law contexts. Previously the conduct and beliefs of someone alleged to have committed a wrong were measured against those of the "reasonable man". Despite the change to gender-neutral language, a male perspective continues to inform many decisions made by the courts. However, recent decisions reveal that courts are beginning to apply a reasonable person standard which encompasses the views of the typically female victim. *Stadnyk v. Canada (Employment and Immigration Commission)*⁹⁴ was the first Canadian case to adopt the standard of the reasonable woman in its analysis of whether sexual harassment had occurred. Although the complainant did not ultimately succeed with her case, the Court followed the approach in the leading American case, *Ellison v. Brady*:⁹⁵

91. (1984), 5 C.H.R.R. D/2274 (B.C. Board of Inquiry); aff'd (1985), 6 C.H.R.R. D/2651 (B.C.S.C.)

92. [1985] 2 S.C.R. 536.

93. *Supra* note 50 at s. 3(o)(i) [emphasis added].

94. (1993), 22 C.H.R.R. D/173 (Canadian Human Rights Tribunal).

95. 924 F.2d 872 (9th Cir 1991).

[I]n evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. . . . If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of re-enforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.⁹⁶

The greater focus on a female perspective has led to some more encompassing definitions of sexual harassment. In *Shaw v. Levac Supply Ltd.*⁹⁷ the Ontario Board of Inquiry recognized that verbal harassment did not have to be sexually explicit in order to be included in the statutory definition of sexual harassment. In this case, the complainant had been harassed for a period of fourteen years by one of her co-workers. Among other things, he called her a "fat cow", mimicked the sound of her nylons as she walked by his desk, and repeatedly made reference to her sexual unattractiveness. The complainant testified that she found his behaviour hurtful and humiliating and there was evidence that she had burst into tears on several occasions. The court found that the conduct constituted sexual harassment and held both the co-worker and the company responsible.

Verbal harassment, which formed the basis of the complaint in *Shaw v. Levac Supply Ltd.*,⁹⁸ is the most common form of sexual harassment. However it is often the most difficult to prove. This is also true for some forms of visual harassment such as leering, sexual gestures or inappropriate graffiti. In cases that primarily involve more ambiguous forms of harassment, as opposed to more extreme cases like fondling, courts will look at the degree of offensiveness and the frequency rate of the conduct. The threshold test for verbal harassment is outlined in *Aragoma v. Elegant Lamp Co.*⁹⁹ The combination of offensiveness and frequency must be such that the victimized employee reasonably believes that continued exposure to the conduct is a condition of the job.¹⁰⁰ A victimized student might have to show that she believes that continued exposure to sexual harassment is a condition of getting an education.

The contextualized nature of sexual harassment leads to an inconsistent application of the reasonable person standard in many cases.¹⁰¹ Sometimes a single remark can be offensive enough to be considered

96. *Ibid* at 878.

97. (1991), 14 C.H.R.R. D/36 (Ont. Board of Inquiry).

98. *Ibid*.

99. (1982), 3 C.H.R.R. D/1109 (Ont. Board of Inquiry).

100. *Ibid*.

101. K. Gallivan, "Sexual Harassment after *Janzen v. Platy*: The Transformative Possibilities" (1991) 49 U.T. Fac. L. Rev. 27.

sexual harassment, but at other times, courts have found that such behaviour comes within acceptable standards for that environment. If conduct can be characterized as part of the "normal" environment, then the complainant must show a sufficient degree of frequency, as well as proving she attempted to make it known to her harasser that the behaviour was unwelcome.¹⁰² In cases such as *Re Ottawa Board of Education and Ottawa Board of Education Employees Union*,¹⁰³ where the conduct is something like an unsolicited hug or non-sexual touching, courts are unwilling to find that the behaviour constitutes sexual harassment if the complainant neither did nor said anything to indicate to the other party that the behaviour was unacceptable. In *Daigle v. Hunter*¹⁰⁴ the complainant secretary was asked personal questions which were sexual in nature and summoned to a lounge area to be shown a copy of *Playboy*. She also found that the office atmosphere was offensive because off-colour jokes were frequently made and risque Christmas gifts were exchanged at a staff party. The court found that the requisite persistence and frequency of sexual harassment was absent¹⁰⁵ and noted that if the complainant found the norm of the workplace offensive, she had an obligation by her words or conduct to bring it to the attention of the offenders or management.¹⁰⁶ The fact that the plaintiff laughed at some of the jokes and read aloud an article of a sexually explicit nature to a male employee on a previous occasion, counted against her in the eyes of the Board of Inquiry.

Emphasis placed on the past conduct of the complainant in human rights cases can be troubling. At one level, it may be necessary to ensure the fair hearing of the alleged harasser. That being said, judges are also influenced by preconceived notions of a victim's appropriate response to sexual harassment. When one considers the vulnerable position of a victim and the feelings of self-blame often associated with sexual harassment, it is not surprising that they do not vehemently express their disapproval of certain behaviour. Laughing off harassing behaviour or responding in kind with another offensive joke, are common self-protective reactions by girls and women dealing with a hostile environment at school and work.¹⁰⁷ A consideration of the victim's conduct can also be problematic where she has had prior relations with her harasser. A number of the more serious cases of sexual harassment between

102. *Re Ottawa Board of Education and Ottawa Board of Education Employees' Union* (1989), 5 L.A.C. (4th) 171.

103. *Ibid.*

104. (1988), 10 C.H.R.R. D/5670 (N.B. Board of Inquiry)

105. *Ibid.* at D/5671.

106. *Ibid.* at D/5678.

107. *Supra* note 19.

students occur where the harasser is a former boyfriend of the victim. In dating situations or where relations between two parties have been at least amicable, a certain amount of teasing or banter may have been acceptable at some point in the past. This does not mean that the harassed victim consents to all future behaviour.

A final problem relating to the burden of proof which has to be met by the complainant has to do with behaviour which is both sexual harassment and harassment based on another prohibited ground of discrimination. As mentioned in Part I, minority women are often subjected to sexual insults laced with racial slurs.¹⁰⁸ Harassment which is both racist and sexist poses a problem for minority women because the structure of human rights legislation forces them to decide whether the offensive behaviour is primarily gender-based or race-based.¹⁰⁹ It is a problem which goes to the heart of human rights legislation and other rights-based documents.¹¹⁰ Sexual harassment doctrine treats every situation as if it were a case of a white man harassing a white woman, even though the behaviour may have occurred precisely because the woman has characteristics of two of the groups protected by human rights codes.¹¹¹

2. Remedies

Remedies available to students who have been found by a tribunal or court to have been sexually harassed can take two forms, compensatory awards or proactive remedies. In terms of compensation, awards for pain and suffering are fairly small but they do recognize the destructive impact sexual harassment can have on the victim. Unlike complaints of sexual harassment in the workforce, however, a student would not be eligible for lost wages compensation which accounts for the bulk of a monetary award in employment-related cases.

Human rights tribunals also have the authority to order proactive remedies which must be carried out by the employer. By virtue of the Nova Scotia *Human Rights Act*, a board of inquiry can order "any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor."¹¹² The authority of

108. See discussion *supra* accompanying notes 26 and 27.

109. Similar arguments can be made regarding sexual harassment experienced by disabled and homosexual persons.

110. N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25.

111. *Ibid.*

112. *Supra* note 50 at s. 34(8).

human rights tribunals to make remedial orders forcing employers to change discriminatory practices was upheld by the Supreme Court of Canada in *Canadian National Railway Company v. Canada (Canadian Human Rights Commission)*.¹¹³ The tribunal found that C.N. Railway systemically discriminated against women in its employ and issued a remedial order requiring the Company to change its hiring and employment practices. Detailed procedures and quotas were set out in the order and a process of periodic review by the Commission was also provided for in the document. In a case where a school board is found responsible for sexual harassment in a school, a remedial order could require the Board to establish and effectively enforce a sexual harassment policy or education programme.

3. *Other Legal Avenues*

An in-depth consideration of every legal course of action available to sexual harassment victims is beyond the scope of this paper. However, it may be useful to at least mention other possible options available to a student who wishes to pursue a legal claim for sexual harassment. In some provinces, the school boards' enabling legislation may provide an administrative law remedy. In Nova Scotia, the new *Education Act*, which came into force in January 1996, added a provision requiring school boards to establish anti-harassment policies for their students:

A school board shall in accordance with this Act and the regulations . . . establish a policy for the protection of students from harassment and abuse.¹¹⁴

It is possible that where a school board has failed to fulfil its obligation according to this type of provision, a student or group of concerned parents or staff may be able to ask for the remedy of mandamus in order to force the Board to act. Mandamus is a remedy which can be used to overcome the inaction of a person charged with the performance of duties of a public nature.¹¹⁵

Sexual harassment which escalates into more extreme physical and sexual violence may amount to criminal conduct. *Criminal Code*¹¹⁶ provisions such as s. 265 (assault), s. 269 (unlawfully causing bodily harm) and s. 271 (sexual assault) may be applicable. The burden of proof in criminal cases, however, is much more onerous and the focus is on punishment of the offender.

113. [1987] 1 S.C.R. 1114.

114. *Supra* note 75 at s. 64(2)(i).

115. See *Karavos v. Toronto (City of) and Gillies*, [1948] 3 D.L.R. 294 (Ont. C.A.).

116. R.S.C. 1985, c. C-46.

Sexually harassing behaviour can also amount to an assault, battery or intentional infliction of mental suffering in tort law. Again, however, the requirements for a cause of action based in tort law are more stringent than the burden of proof before a human rights tribunal. Nonetheless, a number of plaintiffs in the United States have been awarded tort damages for sexual harassment by other employees and employers.¹¹⁷ To date, most of the successful American plaintiffs have based their cause of action on intentional or negligent infliction of emotional distress.¹¹⁸ A new tort of sexual harassment also appears to be emerging in the United States. In the case of *Kerans v. Porter Paint Co.*¹¹⁹ an employee and employer were both held liable for sexual harassment of the plaintiff. To find an employer liable under a tort of sexual harassment, the court suggested that the plaintiff must prove: (1) the offending employee had a past history of sexually harassing behaviour and (2) that the employer knew or should have known about it.¹²⁰

Finally, the *Charter of Rights and Freedoms*¹²¹ comes to mind for any case involving freedom from discrimination and the equality of individuals. It is unlikely, however, that a student who is a victim of sexual harassment could mount a successful *Charter* challenge against a school board. Presuming one could successfully argue under s. 32 that the *Charter* applies to school boards, one would then have to show that the victim's rights had been violated because of a discriminatory law or conduct by a government official. In sexual harassment cases it is the school board's failure to act which causes the discrimination. In the past, courts have held that inaction by government officials does not constitute a *Charter* violation. In any event, seeking redress under the *Charter* is highly impractical in terms of the prohibitive costs and lengthy delays involved.

The time and financial investments necessary to launch a legal case for sexual harassment are setbacks for any student. Legal avenues may be most appropriate for extreme cases of sexual harassment. But for a student who only attends high school for three or four years, legal avenues will generally be ineffective. Ultimately most sexual harassment victims just want the offensive behaviour to stop immediately. On this basis,

117. J.D. Dennis, "Sexual Harassment in the Workplace: A New Frontier in the Law of Torts" 19 Ohio N. U. L. Rev. 613. By 1993, at least thirteen states had awarded damages in tort for situations of workplace harassment.

118. *Ibid.*

119. 575 N.E. 2d 428 (Ohio 1991).

120. *Ibid.* at 434-35.

121. Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

remedial orders requiring school boards to implement a sexual harassment policy and monitor student behaviour are one of the positive outcomes of laying a human rights complaint. Yet as it becomes increasingly obvious to parents and educators that sexual harassment creates an unhealthy learning environment, it is hoped that most school boards will do something about the problem on their own initiative.

III. *School Policies and Prevention*

School boards, administration and staff at schools are best situated to address the problem of student to student sexual harassment in the schools by coming up with localized solutions. Even at the level of pure self-interest it makes sense for school boards to arrive at some sort of solution to the problem, because in so doing they may protect themselves from legal liability. The development of a sexual harassment policy is a good starting point because it demonstrates institutional support for victims of sexual harassment.¹²² A policy will only be effective where it is implemented as part of a comprehensive programme designed to educate students and staff on the issues around sexual harassment.

1. *Development of Sexual Harassment Policies*

A school board's sexual harassment policy should be designed to cover and apply to everyone within the system including students, teachers, administration, support staff, contractors and volunteers. The policy must be grounded in the experiences of the target group it is meant to serve and as such must involve representatives from each of the target groups in the development and implementation process. If the perspectives of potential users are not reflected in the policy, then they are unlikely to have faith in its effectiveness.¹²³ As a whole, the policy should be complainant-driven in terms of the initiation of a complaint, the selection of procedures and the remedial measures chosen.¹²⁴

122. *Supra* note 3 at 131.

123. E. Wharton, "If You Don't 'Get It', You Can't Stop It" in L.F. Geller-Schwartz, ed., *From Awareness to Action: Strategies to Stop Sexual Harassment in the Workplace* (Ottawa: Women's Bureau, Human Resources Development Canada, 1994) at 107.

124. J. Kilcoyne, "The 'Politics of Policies': Responding to Sexual Harassment on Campus" (1994) 3 C.L.E.L.J. 33.

2. *Components of a Policy*

A well-designed sexual harassment policy¹²⁵ should be as accessible as possible to its target audience. It is important then, that the policy be written in plain language. The policy should contain a preamble which explains the purpose of the policy and the school board's commitment to maintaining a school which is free of sexual harassment. A simple yet comprehensive definition of sexual harassment should be included which assists in clarifying the distinction between offensive and non-offensive conduct. It is important that the policy outline reporting procedures for both informal and formal complaints. As well, a list of timely remedial options and possible sanctions should be part of the policy. Finally, the policy should include a review mechanism by which it can be amended if parts of it are found to be inadequate or ineffective.

3. *Possible Pitfalls*

School boards should attempt to avoid certain pitfalls when formulating a policy. The first of these arises when reporting procedures are not clearly delineated in a policy. It is important at the outset for a student victim of sexual harassment to be able to speak to someone she can trust about her complaint in order to assess her options. The willingness of a victim to report an incident may hinge on whether or not there is a supportive staff member in the school who is to be approached initially. Although many complaints do not move past the informal stage, it is better if the person designated to receive complaints is not the same person who is entrusted with the formal investigation. The reporting procedure set up in the policy should not require a complainant to repeat her story to several different individuals in authority, as this is tantamount to reliving the abusive incident.

A second concern which should be addressed in the policy is the issue of confidentiality. Many students perceive that complaints to school authorities are not treated confidentially among staff.¹²⁶ A victim may fear that she will face retaliation from her harasser or his friends by reporting the incident.¹²⁷ Confidentiality cannot, however, be guaranteed in all circumstances. Schools have a legal duty to report abuse of a child

125. For essential elements of a good sexual harassment policy, please see *supra* note 3 at 132; Aggarwal, *supra* note 20 at 321; and *supra* note 124 at 47.

126. *Supra* note 1 at 15.

127. *Ibid.*

under the age of sixteen.¹²⁸ As well, potential harassers must be treated fairly by the complaint procedures under the policy.¹²⁹

It should be anticipated that issues relating to the scope of the policy will arise.¹³⁰ For example, what will school authorities do if a student is receiving obscene phone calls at night from another student in the school? Will a student who is being followed home or stalked off the school grounds by a classmate have recourse under the policy? In terms of legal liability, schools are probably only responsible for harassment which occurs on school grounds. But to distinguish harassment which occurs "beyond the schoolhouse gate" is to ignore the effect which such behaviour has within the educational setting.¹³¹ In the interest of victims, schools should still be prepared to deal with troublesome behaviour affecting the student's sense of safety within the school regardless of where it occurred.¹³²

School boards should also be wary about employing conflict resolution strategies as a means of dealing with a complaint. Conflict resolution requires the victim and harasser to work out a solution to the problem between themselves. Although many complainants prefer to deal with a sexual harassment situation in an informal manner, conflict resolution is problematic because it places the harasser and victim in equal bargaining positions. In doing so it suggests that sexual harassment is about a dispute between individuals rather than a problem which arises out of the abuse of male privilege.¹³³ It also reinforces the typical response of avoidance or compromise by students who have been harassed.¹³⁴ The desirability of informal procedures can be maintained without forcing a complainant to bargain for her rights. One example of an informal resolution of a complaint is to have the victim write a letter to her harasser describing the offensive behaviour and what she would like to do about it.¹³⁵ Sending an

128. See for example *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 24(2).

129. Presentation at Dalhousie Women's Centre by Susan Brousseau, Sexual Harassment Advisor, Dalhousie University (21 October 1995).

130. Interview with Nancy Sparks, Resource & Community Co-ordinator, Race Relations, Cross Cultural Understanding & Human Rights, Halifax County-Bedford District School Board (7 December 1995).

131. *Supra* note 124 at 45.

132. Section 122 of the *Education Act*, *supra* note 75 authorizes the school principal to discipline students. Where a student is harassing another student outside of school hours and the conduct is serious enough to warrant immediate response, the school administration may want to consider measures such as removing the harasser from classes shared with the victimized student.

133. *Supra* note 124 at 46.

134. *Supra* note 3 at 135.

135. N. Stein, N. Marshall & L. Tropp, *Secrets in Public: Sexual Harassment in Schools* (Wellesley, MA: NOW Legal Defence and Education Fund and Wellesley College Center for Research on Women, 1993) at 319.

anonymous copy of the school's sexual harassment policy to a harasser is another option.¹³⁶

The concerns surrounding conflict resolution-style procedures relate to more fundamental criticisms of sexual harassment policies as a means of addressing the problem. Because sexual harassment policies are informed by the norms, practices and perspectives of our contemporary legal culture, they share the weaknesses inherent in many rights-based documents.¹³⁷ Thus, policies tend to focus on the pursuit of individual rights and conceive of equality in rather formalistic terms. The legal principles underlying a sexual harassment policy overlook systemic barriers which inhibit an individual's opportunity to exercise her rights. Sexual harassment policies do benefit the small number of students who choose to make use of them and may have a deterrent effect on would-be harassers. Policies also facilitate the identification of sexually harassing behaviour and legitimize the feelings of frustration and isolation that victims experience. Too often, however, a sexual harassment policy assumes a monopolistic position in a campaign against sexual harassment. Instead, policies should be a springboard for the development of other strategies aimed at reducing levels of sexual harassment in the schools.

4. *Education and Prevention of Sexual Harassment*

Education on sexual harassment in the schools is crucial for both staff and students. Training should be provided to administration, teachers and support staff, so that they are able to recognize behaviour as sexual harassment. Intervention and victim response techniques should be offered as part of training sessions for management and staff. A school newsletter would be an appropriate forum to educate parents on the issue and make them aware of school initiatives on sexual harassment.

Education on sexual harassment for students can begin by focusing on the policy itself. The policy should be posted in prominent areas throughout the school and in areas students frequent. Students could also make use of an anonymous phone-in line which provides recorded messages on complaint procedures and contact people within the school.¹³⁸ Similarly, information could be disseminated on the Internet. Other initiatives to raise awareness of sexual harassment include the display of posters, in-class discussions or study units, workshops, student-made videos, etc. It

136. Presentation by Susan Brousseau, *supra* note 129.

137. See for example *supra* note 121, and *Canadian Human Rights Act*, *supra* note 71.

138. Interview with S. Brousseau, *supra* note 129.

is important to remember that because of the turnover rates of students in high schools, anti-harassment measures and educational initiatives need to be reinforced from time to time.¹³⁹ Many of the educational activities for high school students can be adapted for younger students.¹⁴⁰ Because sexual harassment begins at the elementary school level, it is important to teach younger children about the inappropriateness of harassing behaviour before gender stereotypes become more firmly entrenched.

One of the most effective ways to tackle sexual harassment occurring in schools is to provide students with a forum to discuss the issue.¹⁴¹ Whether these discussions take place as part of a study unit or a workshop, educators recommend that students first explore the issue within gender specific groups.¹⁴² A mixed gender setting can make both male and female students feel vulnerable. Boys may get defensive and trivialize the issue; girls may be nervous about backlash if they speak out. While it is essential to hear from both boys and girls in order to explode gender stereotypes and myths related to the issue, girls should not be silenced in the process. Girls need to have a safe and supportive space to first broach the subject matter.¹⁴³ The opportunity to explore this issue in a single sex setting provides a unique opportunity for young women to dialogue across racial and class lines. Such an experience can create solidarity and empowerment among the young women present.

5. *Gender Equality: A Four Pronged Approach*

Sexual harassment is only one of the manifestations of gender inequity in schools and in society. Anti-harassment campaigns should be one aspect of a holistic approach designed to ameliorate gender inequity. Educators June Larkin and Pat Stanton have developed the AICE model to tackle gender inequity from several different angles.¹⁴⁴ The AICE model identifies four broad objectives to improve the learning environment for

139. B. Whittington, "Sexual Harassment - A View from the Universities" in L. Geller-Swartz, ed., *From Awareness to Action Strategies to Stop Sexual Harassment in the Workplace* (Ottawa: Women's Bureau, Human Resources Development Canada, 1994) at 28.

140. One educator suggests introducing the topic of sexual harassment to primary and elementary students as "bullying" in order to avoid labelling young boys as probable harassers.

141. Educators have developed a variety of interesting strategies to facilitate discussion around sexual harassment. An interesting exercise used by June Larkin to illuminate the gender differential in sexual harassment, is to ask small groups of students to come up with a list of insults for women and a separate one for men. The list for women is always easier for male and female groups to come up with and it is inevitably longer. Many of the typical insults for boys relate to a "feminine" quality.

142. *Supra* note 19.

143. *Ibid.*

144. *Supra* note 3 at 151-52.

female students: access, inclusion, climate and empowerment. The first objective includes initiatives designed to improve access for girls in non-traditional streams such as math and science or leadership roles within the school community. The second objective stresses the need to adapt and sometimes radically alter curricula and teaching styles to be more inclusive of the female perspective. An anti-harassment campaign is the type of step which can be taken to improve the climate or learning environment for girls. Finally, the goal of empowerment seeks to improve girls' self-esteem by encouraging them to confront the sexism in their lives.

Efforts to foster a more positive, nurturing environment for girls in school will ultimately fail unless schools adopt a multi-faceted approach to gender equality. It is not sufficient to encourage girls to pursue math and science electives if they are consistently put down in class. Curriculum changes have to move beyond the "add women and stir" approach.¹⁴⁵ Educators need to examine at a more fundamental level, the values which are being emphasized in the classroom.

Conclusion

A school is the nucleus of a student's social life but it can also be a toxic place for girls who face a daily barrage of sexist leers and jeers. Obviously not every female student experiences sexual harassment on a regular basis; nor is every male student a harasser. But to the extent that sexual harassment is commonplace in the school hallways and classrooms, the climate is imperceptibly poisoned for all students. As long as sexual harassment goes unchecked by school officials, girls implicitly learn that they should expect and tolerate such behaviour. Case law suggests that a school board can be held legally liable for its failure to protect students from sexual harassment. While a student may succeed in a legal action brought against a school board for sexual harassment, recent court decisions are best used as political leverage by concerned students, educators and parents to force the school system to take action against sexual harassment. Many school boards have already begun the process by developing sexual harassment policies for students and staff. This is a step in the right direction to eliminate sexual harassment in the first instance and to strive towards a broader goal of gender equity in our schools.

145. *Supra* note 43.